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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

OMNI INSURANCE COMPANY, a foreign insurance
company; and CREDIT CONTROL SERVICES, INC. d/b/a
CREDIT COLLECTION SERVICES,

Petitioners,

v.

MICHAEL STEPHENS

Respondent.

APPELLANT OMNI INSURANCE
COMPANY'S AMENDED REPLY
BRIEF

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I. INTRODUCTION

Omni fully paid its insured, York, for injuries she sustained in an automobile accident caused by Stephens and thereby became subrogated to York's claim against Stephens. Omni referred its subrogation claim to an independent third party, CCS, for recovery. Once the claim was referred, Omni's involvement ceased.

These facts do not support a holding on summary judgment that Omni itself breached the CPA. The referral of a subrogation claim is not, as a matter of law, an unfair or deceptive act. Nor, as a matter of law, does it constitute an act in trade or commerce with reference to Stephens. In addition, even if Stephens could establish the first two CPA elements against Omni, material issues of fact exist as to whether Omni's conduct caused Stephens any injury, without which there can be no cause of action.

Finally, Stephens has also failed to establish that Omni may be held vicariously liable for CCS's conduct.

The summary judgment against Omni must, therefore, be reversed.

II. ARGUMENT

CCS will address the arguments regarding its alleged violation of the CPA. Omni, therefore, restricts its comments in reply to Stephens's arguments (A) that Omni's own conduct violated the CPA and (B) that Omni should be held vicariously liable for CCS's conduct.

A. **Omni did not commit an unfair or deceptive act or practice.**

Omni's sole act with regard to Stephens was to refer its subrogation claim against Stephens to CCS. Stephens fails to explain how this constitutes an unfair or deceptive act or practice.¹ Stephens makes only the general argument that Omni "put everything in motion."²

Preliminarily, that argument is inapt. Stephens, in fact, "put everything in motion" by negligently causing

¹ Stephens's only specific discussion of this element occurs in connection with its arguments against CCS. Stephens asserts that the notices CCS sent to Stephens constitute deceptive conduct. Response Brief at 22-23.

² Response Brief at 23.

injury and damage to York. If, however, Stephens means to identify the first allegedly unfair or deceptive act in the alleged chain of causation, then Omni's referral is not what "put everything in motion" any more than Stephens's negligence is. It is the manner in which the claim was pursued by CCS that, for Stephens, "put everything in motion."

Referring a subrogation claim to a collection agency is not an unfair or deceptive act or practice. Stephens's position appears to be that an insurer may refer a claim for recovery only if it has obtained a judgment with respect to that claim—that is, Omni can refer a subrogation claim for handling by CCS only if it has first reduced the claim to judgment. There is no authority for that proposition. Stephens admits that "subrogation recovery" is a lawful activity.³ When Omni referred its subrogation claim to CCS it was acting lawfully. It was not required by law to handle the claim only with Omni personnel. Omni's

³ Response Brief at 28.

conduct in referring an unresolved subrogation claim to CCS was not unfair or deceptive.

Moreover, Stephens fails to explain who could have been deceived by Omni's conduct. The only other party involved—CCS—was fully informed as to how the subrogation claim arose. CCS was not deceived.

As a matter of law, Omni did not itself commit an unfair or deceptive act or practice.

B. Omni cannot be held vicariously liable for CCS's actions.

Because Stephens is unable to prove a CPA claim directly against Omni, he must try to establish a basis to hold Omni vicariously liable for CCS's conduct. None of Stephens's theories of vicarious liability may be sustained under the facts of this case.

1. Omni and CCS are neither joint nor concurrent tortfeasors.

Stephens claims Omni may be considered either a joint tortfeasor or a concurrent tortfeasor. However, he cites no authority supporting the application of tort principles to a CPA claim. Indeed, the Supreme Court has

noted the CPA “is not a tort-based remedy.”⁴ Nonetheless, even if tort principles were to apply to a CPA claim, they do not support the conclusion that Omni should be treated as a joint or concurrent tortfeasor.

“Joint tort-feasors are those who have acted in common or who have breached a joint duty. . . .

Concurrent tort-feasors are those whose independent acts concur to produce the injury.”⁵ The harm caused by both joint and concurrent tortfeasors is indivisible.⁶ Although Stephens claims an indivisible injury in this matter, neither the joint tortfeasor nor the concurrent tortfeasor concept applies here.

a. Omni and CCS are not joint tortfeasors.

Omni will not be considered a joint tortfeasor unless three elements exist: “(1) A concert of action; (2) a unity of purpose or design; (3) two or more defendants working separately but to a common purpose and each acting with

⁴ *Sing v. John L. Scott*, 134 Wn.2d 24, 46, 948 P.2d 816 (1997).

⁵ *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978) (citations omitted).

⁶ *Id.*

the knowledge and consent of the others.”⁷ Here, even if one assumes the fact that Omni’s and CCS’s shared interest in collecting the subrogation claim could establish a unity of purpose or design, the other joint tortfeasor elements are missing.

The record establishes there was no concert of action between Omni and CCS. Stephens’s only claim for such “concert of action” is that Omni told CCS how much money Stephens owed Omni under its subrogation claim.⁸

However, the record establishes that, once Omni provided that information to CCS, its involvement in the matter ceased. (CP 216-17) CCS solely determined how it would attempt to recover the money from Stephens. Omni was not provided and therefore did not review the letters or notices sent by CCS; it had no input or involvement in the wording, the typeface, or the format of those communications. (CP 217) CCS had “sole direction over the collection of the

⁷ *Elliott v. Barnes*, 32 Wn. App. 88, 90-91, 645 P.2d 1136 (1982).

⁸ Response Brief at 51.

claim.” (*Id.*) Stephens’s claim against CCS is premised entirely upon the written communications CCS sent to him. Because Omni had no involvement in those communications, it cannot be found to have acted in concert with CCS with respect to those communications.

Moreover, because Omni had no knowledge of how CCS was proceeding, the third required joint tortfeasor element is also missing. Stephens presented no evidence contradicting the evidence establishing Omni had no involvement with CCS’s communications with Stephens. Had such evidence been presented, at most it would have created a material issue of fact regarding whether Omni and CCS were joint tortfeasors.

b. Omni and CCS are not concurrent tortfeasors.

For the first time, Stephens claims Omni and CCS were concurrent tortfeasors. Theories raised for the first time on appeal should not be considered.⁹ However, even if

⁹ *Wilson v. Steinbach*, 98 Wn.2d 434, 404, 656 P.2d 1030 (1982); *Olson v. Siverling*, 52 Wn. App. 221, 230, 758 P.2d 991 (1988).

the Court were to consider this argument, it does not support Stephens's case.

Concurrent tortfeasors are parties who have each breached a separate duty to the claimant.¹⁰ Thus, the concurrent tortfeasor principle makes two parties, who are both independently liable to the claimant for their own tortious acts, jointly and severally liable for the claimant's indivisible injury. If the concept were to apply to CPA actions, at most, it would make two parties *who had both committed CPA violations* jointly and severally liable for the claimant's injuries. It would not relieve the claimant of his burden of proving the elements of a CPA claim independently against each party.

By asserting that Omni and CCS were concurrent tortfeasors, Stephens is attempting to bootstrap Omni into his CPA claim against CCS, without proving all five CPA elements against Omni. As discussed above, Stephens cannot prove the elements of a CPA claim against Omni, particularly that of an unfair or deceptive act or practice.

¹⁰ *Seattle-First Nat'l Bank*, 91 Wn.2d at 235.

The allegedly “deceptive act” at issue is CCS’s mailing of the notices to Stephens, and Omni had no involvement with the sending of those notices. Moreover, Stephens has not established that retaining a collection agency to assist with pursuit of a subrogation claim is an unfair or deceptive act or practice. Because Stephens cannot prove a CPA claim against Omni, Omni cannot be considered a concurrent tortfeasor.

2. The parties did not engage in a joint venture.

As with the concurrent tortfeasor argument, Stephens claims for the first time on appeal that Omni and CCS were involved in a joint venture. The Court should not consider this new legal theory raised at this late date.¹¹ However, even if the Court were to consider this argument, it does not assist Stephens in his attempt to hold Omni liable for CCS’s actions.

¹¹ *Wilson*, 98 Wn.2d at 404; *Olson*, 52 Wn. App. at 230.

“Joint ventures are not created by operation of law. They arise by express or implied contract.”¹² The present case does not involve an express contract for a joint venture. Stephens has provided no evidence of the terms of any express contract between Omni and CCS, let alone an express agreement to form a joint venture. Any joint venture must, therefore, be implied. However, there is also no evidence to find an implied joint venture exists.

“[A] joint venture does not arise unless there is (a) a common purpose and intention *to act as joint venturers*; (b) a community of interest; and (c) an equal right to a voice accompanied by an equal right of control.”¹³ All three elements are lacking in this case.

The record is devoid of any evidence supporting any conclusion that Omni and CCS agreed to act as joint venturers. Stephens argues that Omni and CCS “shared a

¹² *Adams v. Johnston*, 71 Wn. App. 599, 611, 860 P.2d 423 (1993) (citing *Paulson v. County of Pierce*, 99 Wn.2d 645, 654, 664 P.2d 1202 (1983)).

¹³ *Adams*, 71 Wn. App. at 611 (emphasis added).

common purpose and intent to pursue Stephens”¹⁴

However, even if such a common purpose and intent existed, it is not a common purpose and intent to act as joint venturers.

Stephens argues the community of interest element is satisfied because Omni and CCS “each shared a community of interest in the sums to be collected”¹⁵ He bases this claim entirely upon one statement made by Omni in its opening brief. In explaining why it was not liable with CCS as a joint tortfeasor, Omni stated, “CCS was attempting to recover a subrogation claim, and Omni had an interest in that claim. Whether the shared interest in the claim amounts to a ‘unity of purpose or design’ within the meaning of *Elliott* is debatable.”¹⁶ Any entity which retains

¹⁴ Response Brief at 53.

¹⁵ *Id.*

¹⁶ Omni’s Opening Brief at 21. From this statement, Stephens extrapolates that “CCS was to be paid a percentage or commission of the monies it collected for Omni” Response Brief at 52. There is no evidence in the record regarding the financial arrangement between Omni and CCS. Even if true, however, such a financial arrangement would not give or demonstrate control by Omni over the business practices of CCS.

another entity for assistance in its business has a degree of “shared interest” in the service being performed. A taxi passenger has a “shared interest” with the driver in arriving at his destination. A client has a “shared interest” with his lawyer in achieving a favorable outcome. And so on. Such a “shared interest” cannot make the entities joint venturers, especially in the absence of a common purpose and intention to act as joint venturers.

Finally, Stephens’s argument that Omni and CCS were joint venturers fails because the only evidence in the record regarding the issue of control directly contradicts the argument that Omni had “an equal right to a voice accompanied by an equal right of control.” David Quigley of Omni testified that, once information regarding a particular matter was sent to CCS, “Omni had no more involvement in CCS’s efforts to collect the subrogation claim.” (CP 216-27) He testified that “Omni does not exercise control over how CCS pursues recovery of subrogation claims.” (CP 217) “Once a matter is referred to CCS, CCS has sole direction over the claim.” (*Id.*)

Stephens presented no evidence that contradicts these statements and, even if he had, at most it would have created a material issue of fact regarding whether Omni had "an equal right to a voice accompanied by an equal right of control."

None of the elements of a joint venture is present here. Omni is, therefore, not liable for CCS's acts as a joint venturer.

3. CCS was acting as an independent contractor.

Stephens claims CCS was acting as Omni's agent when it sent the notices to him. The primary issue with regard to whether Omni may be held vicariously liable as a principal for CCS's acts is whether Omni had the right to control how CCS proceeded.¹⁷ In addition, the right to control must relate directly to the activities from which the claimed negligence flows.¹⁸ Thus, in the present matter, to

¹⁷ *Kroshus v. Koury*, 30 Wn. App. 258, 263, 633 P.2d 909 (1981).

¹⁸ *Id.*, 30 Wn. App. at 264 (quoting *Jackson v. Standard Oil*, 8 Wn. App. 83, 91, 505 P.2d 139 (1972)).

establish vicarious liability, Stephens must show that Omni had a right to control how CCS pursued the subrogation claim against him. Stephens has failed in his burden of proof. The only evidence in the record shows that Omni had no involvement with CCS's communications with Stephens. "Once the matter was referred to CCS, CCS had sole direction over collection of the claim." (CP 217)

Stephens argues sufficient control is present because "[t]hese were Omni's accounts, and Omni could reassign them from CCS if it didn't like the manner in which CCS pursued them."¹⁹ The first flaw with this argument is that there is no evidence in the record establishing the actual terms of Omni's arrangement with CCS. It is, therefore, pure supposition to conclude that Omni could have removed the accounts from CCS at any time. Nonetheless, even if that was the case, the ability to cease a business arrangement does not automatically make a party vicariously liable for all acts of another. The control at

¹⁹ Response Brief at 54.

issue must relate directly to the allegedly wrongful acts committed by the alleged agent.

Here, the allegedly wrongful acts were CCS's communications with Stephens. The right to take accounts away from CCS does not amount to the right to control how CCS proceeded with regard to those accounts. The only evidence in the record establishes that Omni had no involvement with the manner in which CCS communicated with Stephens. (CP 216-27)

*Kroshus v. Koury*²⁰ illustrates that control over some aspects of a relationship, including the right to terminate the relationship, does not make a party vicariously liable for the acts of another. In *Kroshus*, Mary Koury was driving a car to the bank to make a deposit into her husband's Texaco business checking account when she was involved in an accident. The other driver sued Koury and her husband and also named Texaco as a defendant, claiming it was vicariously liable for Koury's acts. The evidence submitted in connection with Texaco's motion for

²⁰ 30 Wn. App. 258.

summary judgment established that Texaco controlled many aspects of its relationship with Koury, including the right to “terminate the relationship at will.”²¹ Nonetheless, Texaco was entitled to summary judgment because the evidence established that “Texaco did not have a right to choose Koury’s bank,” nor did it have the right to control other aspects of Texaco’s bookkeeping.²² As a result, “[t]here was no evidence or reasonable inference from the evidence that Texaco had a right to control the activities that caused the injury, and without that crucial factor, there can be no vicarious liability.”²³

Similarly, there is no evidence showing that Omni had the right to control how CCS pursued the subrogation claim against Stephens. The only evidence in the record establishes that, after Omni referred the claim to CCS, its involvement ceased. (CP 216-17) It cannot, therefore, be held vicariously liable for CCS’s conduct.

²¹ 30 Wn. App. at 262.

²² *Id.* at 266.

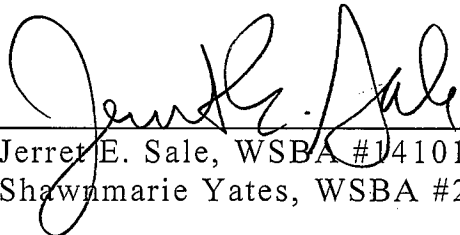
²³ *Id.* at 266-67.

III. CONCLUSION

For the reasons set forth above and in Omni's opening brief, Omni respectfully requests that the order granting summary judgment against Omni and in favor of Stephens be REVERSED.

DATED May 30, 2006

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 30th day of May, 2006, I caused to be served Appellant Omni Insurance Company's Amended Reply Brief to:

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I declare under penalty of perjury under the laws of
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